BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Petition for Declaratory Ruling	)	CC Docket No. 98-62
of Sprint Communications Company, L.P.	)	
to Declare Unlawful Certain RFP	)	
Practices by Ameritech	)	

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

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ATTORNEYS FOR TIME WARNER COMMUNICATIONS HOLDINGS INC.

June 4, 1998

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In the Matter of Petition for Declaratory Ruling of Sprint Communications Company, L.P. to Declare Unlawful Certain RFP Practices by Ameritech	)	CC Docket No. 98-62

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

Time Warner Communications Holdings Inc. ("TWComm"), by its attorneys, hereby files these comments in response to the above-captioned petition filed by Sprint Communications Company, L.P. ("Sprint").

The factual context in which the instant petition was originally filed has changed significantly. Sprint originally filed its petition in response to an Ameritech Request for Proposal ("RFP") issued in early March in which Ameritech sought bids from long distance carriers to enter a local/long distance "teaming" arrangement.[1] Since the issuance of that RFP, U S WEST and Ameritech have both announced "teaming" arrangements with Qwest Communications International, Inc. ("Qwest"). Both the U S WEST and the Ameritech agreements with Qwest have been challenged by long distance carriers and competitive LECs in federal district

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[1] See Petition for Declaratory Ruling of Sprint Communications Company, L.P. (filed April 28, 1998) at 1 ("Sprint Petition").

court as violations of Sections 271(a) and 251(g) of the Communications Act.[2] In both cases, the plaintiffs have sought to enjoin the defendant BOC from continuing the teaming arrangement.[3] The FCC has requested a primary jurisdiction referral in the AT&T v. U S WEST case. Presumably the Commission will also seek a similar referral in the AT&T v. Ameritech case as well.

As the FCC acknowledged in its request for a primary jurisdiction referral, the legal issues raised by the Sprint Petition and by the pending court cases are generally the same.[4] Of course, the Ameritech RFP, the subsequent Ameritech-Qwest agreement and the U S WEST-Qwest agreement (at least what can be inferred from the U S WEST press statements; the agreement itself is confidential) differ in

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2 See AT&T Corp. et. al. v. U S WEST Communications, Inc., No. C98-634 WD (W.D. Wash.); AT&T Corp. et. al. v. Ameritech Corp., No. 98 C 2993 (N.D. Ill.).

3 The court in AT&T v. Ameritech has denied the plaintiffs' request for a temporary restraining order. The plaintiffs' request for a preliminary injunction has been referred to a Magistrate Judge. See AT&T Corp. v. Ameritech Corp., No. 98 C 2993 (N.D. Ill.) (order denying plaintiffs' motion for a temporary restraining order and denying defendant's motion to dismiss).

4 See Memorandum Of The Federal Communications Commission as *Amicus Curiae* In Support Of Primary Jurisdiction Referral filed in AT&T Corp. et al v. U S WEST Communications, Inc., No. C98-634 WD (W.D. Wash.) at 4 (stating that the arguments made by plaintiffs based on Sections 271 and 251(g) are "arguments similar to those made by Sprint in its petition before the Commission"), id. at 7 ("Sprint's petition for declaratory ruling, which is already before the Commission, raises the general issue of the legality of agreements of the type at issue in this lawsuit").

their details. But in each case, the BOC proposes to actively promote a joint offering of its local and intraLATA toll services with the interLATA service of an unaffiliated interLATA service provider. Thus, all three arrangements raise at least the question of the extent to which the BOCs may market interLATA service before a Section 271 application has been approved.

Indeed, there should be no question that the instant teaming arrangements are all prohibited in a state in which a BOC has not received Section 271 approval. The basis for this legal conclusion has been fully briefed by the parties to the pending court cases, and TWComm will not repeat the analysis here in detail. To summarize, as explained in those briefs, BOC marketing of an unaffiliated firm's interLATA services was held to constitute the provision of interLATA service under the Modification of Final Judgment ("MFJ"),[5] and that precedent was codified without modification in Section 271. Until a BOC receives Section 271 approval, therefore, such marketing activities are strictly forbidden.

Furthermore, the equal access provisions of the MFJ prohibit a BOC from expressing a preference for one long distance carrier over another when the BOC communicates with its local customers.[6] This rule has now been codified

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[5] See United States v. Western Elec. Co., 627 F. Supp. 1090 (D.D.C. 1986).

[6] See United States v. Western Elec. Co., 578 F. Supp. 668, 676-77 (D.D.C. 1983).

without modification in Section 251(g). In each of the teaming arrangements at issue, however, the BOC is recommending one long distance carrier over others. These arrangements therefore violate Section 251(g).

Beyond the obvious legal infirmities of these arrangements, there are critical policy issues at stake here for competitive LECs like TWComm. First, Section 271 was designed to give the BOCs an incentive to cooperate in opening their local markets. This is accomplished by permitting a BOC to enter the in-region interLATA market only if the BOC demonstrates compliance with the Section 271 competitive checklist. BOC compliance with the competitive checklist is critical even to facilities-based competitive LECs like TWComm. For example, TWComm cannot compete in the local market without reliable and reasonably priced collocation, call termination and number portability. However, if the BOCs are permitted to establish themselves in the long distance business, even solely as a marketing matter, their incentive to cooperate in providing these inputs (all of which are directly or indirectly contained in the checklist) will be significantly diminished, and local competition could be seriously harmed. Indeed, the Qwest teaming arrangement with U S WEST has already been very effective in establishing U S WEST in the long distance market.[7]

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[7] U S WEST has reportedly already signed up 100,000 customers for Qwest pursuant to their teaming arrangement. See Communications Daily (June 2, 1998).

This is not to say that the BOCs will not bother to apply for Section 271 approval if permitted to engage in the subject teaming. But by beginning to compete with the long distance carriers in establishing themselves in the minds of consumers as providers of integrated offerings, the BOCs can begin the work of capturing market share in the interLATA market before even applying for Section 271 approval. The urgency of cooperating in the implementation of the Section 271 checklist will be accordingly reduced. The BOCs could then afford to delay such cooperation in the hopes that they can either complete an end run around the remaining interLATA restrictions (for example, through Section 706 petitions) or pressure the Congress and the FCC into lowering the standard for Section 271 compliance. This kind of strategy must not be allowed.

Second, while the BOCs have made a point of emphasizing that their offerings are available to all IXCs, even if true, this comes as no consolation to competitive LECs. While thus far understood as a means for unlawful entry into the interLATA market, the teaming arrangements in question are also ways for the BOCs to capture interLATA access minutes from CLECs. This is because the offering of bundled local and long distance services helps to reduce customer churn for both the local and long distance components of the offering.[8] Indeed, the more IXCs that sign up for the

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[8] For example, Qwest has predicted that its relationship with U S WEST will reduce its "customer churn by 75%." See "U S WEST Strikes Marketing Alliance With Qwest In

arrangements in question, the more of the access market the BOCs could tie up. At the same time, the BOCs continue to have the ability to discriminate against competitive LECs in the provision of essential inputs of production. BOCs should not be permitted to market one-stop shopping offerings until those inputs are available under stable and reasonable terms and conditions to competing providers of integrated offerings.[9]

It is therefore crucial that the FCC resolve the legal issues at stake in the teaming arrangements at issue. Specifically, TWComm urges the FCC to move expeditiously to expand the scope of this proceeding to include the legality of the Ameritech and U S WEST teaming arrangements with Qwest. If (as seems likely) the courts refer the issues pertaining to the legality of the Qwest deals under the Communications Act to the FCC, the FCC should then promptly issue a decision finding that both of these agreements result in the unlawful provision of interLATA service in

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Bold Move Skirting Rules," Wall Street Journal, p. A2 (May 7, 1998). The reduction of customer churn for the bundled offering of course includes tying up customers for local service.

[9] This is certainly not the case now, as no BOC has demonstrated compliance with the Section 271 competitive checklist. In addition, the BOCs have, for example, (1) successfully delayed the resolution of pricing disputes regarding collocation, (2) defied the reciprocal compensation requirement by refusing to make reciprocal compensation payments to CLECs serving Internet access providers, and (3) (in the case of SBC and BellSouth) delayed the implementation of local number portability.

violation of Section 271 and a violation of the equal access requirements codified in Section 251(g).

CONCLUSION

The Commission should expand the scope of this proceeding to include the legality of the Ameritech and U S WEST teaming arrangements with Qwest. If the courts refer the issues pertaining to the legality of the Qwest deals under the Communications Act to the FCC, the FCC should then promptly issue a decision finding that both of these agreements result in the unlawful provision of interLATA service in violation of Section 271 and a violation of the equal access requirements codified in Section 251(g).*

Respectfully submitted,

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* Electronic filing submitted via 3.5" diskette to Janice Myles, Common Carrier Bureau.